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**FILED**

MAY 11 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

SUPREME COURT OF THE  
STATE OF WASHINGTON  
Case No. \_\_\_\_\_

PETITION FROM THE WASHINGTON STATE COURT OF  
APPEALS, DIVISION THREE  
NO. 29508-7

**FILED**  
MAY 16 2012  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

MICHAEL ALLEN CLARK

Petitioner

**MICHAEL CLARK'S  
PETITION FOR REVIEW**

Submitted by:

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**I. IDENTITY OF PETITIONER**

Petitioner Michael Clark is an enrolled member of the Colville Confederated Tribes, and was convicted of Theft First Degree in Okanogan County Superior Court.

**II. CITATION TO COURT OF APPEALS DECISION**

Division III issued its published opinion in this case No. 29508-7-III on April 12<sup>th</sup>, 2012. A copy of Division III's Opinion is attached at Appendix A.

**III. STATEMENT OF THE CASE**

**A. Factual History.**

Michael Clark is an enrolled member of the Colville Confederated Tribes, and is a resident of Omak, Washington on the Colville Indian Reservation. The State charged Michael Clark with Burglary in the 2nd Degree, Theft 1st Degree, and Malicious Mischief in the 3rd Degree, CP 95. The charges stem from the October 13th, 2009 burglary of a railroad depot which sits on fee land, but is on the Reservation. RP 29-30 The Omak police obtained a search warrant for Clark's trailer (which sits on trust land on the Reservation) from a District Court judge in Okanogan County. RP 27. The detective made no effort to obtain a search warrant from a judge from the Colville

Confederated Tribes. RP 28. The detective did not seek assistance from the tribal police either. RP 28. The detective is not cross-commissioned as an officer with the tribe. RP 27. The detective then served the search warrant on Mr. Clark's home and found stolen items from the railroad burglary present in his home. RP 315.

**B. Procedural History.**

Michael Clark filed a motion to suppress evidence on June 3rd, 2010, arguing that the police should have obtained a warrant from the Colville Tribal Court to search his residence. CP 80-83. A hearing was held and testimony was taken from Detective Koplín (RP 17) and briefly from Michael Clark (RP 42). The trial court denied the defendant's motion to suppress. CP 48-50.

Michael Clark also filed a pre-trial motion entitled "Defendant's Motion to Dismiss Case, or in the Alternative to Reconfigure Jury Venire" on June 14th, 2010. CP 73-79. This motion objected to the fact that Okanogan County Clerk issued summonses in a manner that were not compulsory for Native Americans living on trust land on the Colville Indian

Reservation. The relief sought was that the court should order the county clerk to send the summonses to the Colville Tribal Court for issuance to tribal members living on the reservation. CP 77. This motion was also denied by the trial court. CP 46-47. The judge explained: "I see friends of mine that I know are native that appear on jury panels." RP 55. The Judge explained "there are native people and tribal members who . . . serve on juries here all the time..." RP 55. However, when the case proceeded to the jury trial, the clerk's summonses failed to yield a single Native American to the jury pool (RP 159). Okanogan County's population is 11% Native-American. CP 78-79. At trial, Mr. Clark was acquitted of Burglary and Malicious Mischief, but convicted of Theft in the First Degree. RP 455.

**IV. ISSUES PRESENTED**

A. Does the Constitution require the Superior Courts of Washington to attempt to compulsorily summon Native Americans living on trust land on an Indian Reservation to appear for jury service when a legal or practical mechanism exists for the court to do so?

B. Does the Constitution require local police departments to obtain, or to attempt to obtain, a search warrant issued by a tribal court, prior to searching the home of a tribal member living on trust land on an Indian reservation?

**V. DISCUSSION**

**A. Basis for review under RAP 13.4.**

As described below, this matter concerns issues of constitutional significance and substantial state-wide public interest, thus qualifying for Supreme Court review under RAP 13.4(b)(3) & (4).

**B. The Constitution requires the Superior Courts of Washington to attempt to compulsorily summon Native Americans living on trust land on an Indian Reservation to appear for jury service when a legal or practical mechanism exists for the court to do so.**

The current system in Okanogan County does not properly summon Native Americans living on trust land to appear for jury service. Despite the fact that Okanogan County covers considerable trust land, and one half of the Colville Reservation, most tribal members are not required to appear.

The trial court refused the defense request that the Superior Court of Okanogan issue the summonses in a manner so as to compel Native Americans living on the reservation. The jury summonses of Okanogan

County Superior Court are a form of state court civil process. Under the case of North Sea Products v. Clipper Seafood, such state civil matters are unenforceable on Indian Reservations. 92 Wn. 2d 236, 595 P.2d 939 (1979) (invalidating a state-court garnishment). "Traditionally, the courts have held that personal service of process cannot be effected while an Indian is on the reservation." Balycat Law Offices v. Maiers, 1998 Mont. Dist. LEXIS 769 (Mont. Dist. Ct. 1998) quoting 1973 Utah Law Review 206. Additionally, the punishments under RCW 2.36.170 for failing to report for jury duty do not apply to Indians on trust or allotted lands.<sup>1</sup> After all, if a tribal member lives on trust land, walks out to his mailbox on trust land, opens the state court jury summons while standing on trust land, and returns to his home and throws the summons away, he cannot be prosecuted in state court because no act occurred on fee land.

Indians are 11% of the county population according to the U.S. census. (CP 78-79). The exclusion of this body invalidates the whole process. Who comes to serve, and who does not come to serve, must be random. One case on point is Brady v. Fibreboard Corp., 71 Wn. App. 280, 857 P.2d 1094 (1993), review denied, 123 Wn.2d 1018, 871 P.2d 599 (1994).

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<sup>1</sup> RCW 37.12.010 provides that the "...state of Washington hereby obligates and binds itself to assume criminal . . . jurisdiction over Indians and Indian territory, . . . but such assumption of jurisdiction shall not apply to Indians when on their trust lands or allotted lands within an established Indian reservation..."

In Brady, the court of appeals reversed a jury verdict because of procedural irregularities. When several jurors on the list did not appear, plaintiff's counsel asked why, and "the judge responded that they had never been called in." Id. at 282. Other judges had excused the jurors, and the court of appeals reversed the verdict and explained:

The procedures used here abridge the statutory mandate of random selection. It is undisputed that the initial panel of 90 was randomly selected. However, the randomness of the panel was destroyed when 14 of the 90 were eliminated by the process employed here.

Id. at 283. Likewise, in the case at bar, invalid summonses compromise the whole process. Like the 14 missing jurors in Brady, many Native jurors will have "never been called in." Aside from the constitutional precepts violated, this clear statutory violation will mandate reversal. "When statutory jury selection procedures are materially violated, the claimant need not show actual prejudice; rather, prejudice is presumed." Id. at 283.

The circumstances in the case at bar are similar to the facts in the case of Taylor v. Louisiana, 419 U.S. 522 (1975). In that case, Louisiana's method of drawing jurors to court was found to be unconstitutional. Louisiana summoned men to appear, but made women's attendance optional or voluntary. The court in Taylor v. Louisiana visited earlier cases and explained:

A unanimous Court stated in Smith v. Texas, 311 U.S. 128, 130 (1940), that "[i]t is part of the established tradition in the use of

juries as instruments of public justice that the jury be a body truly representative of the community." To exclude racial groups from jury service was said to be "at war with our basic concepts of a democratic society and a representative government."

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We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155 -156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

Id. The court struck down a murder conviction due to the failure to compulsorily include women in jury pools. Likewise, Michael Clark, before trial, requested the court to take steps to compel the attendance of on-reservation Indians for jury service.

The best solution would have been to ask the Federal Courts or the Colville Tribal Court to issue the jury summonses to the Indians living on the reservation. Unlike a mailed state-court jury summons, a summons of a Federal Court or Tribal Court will compel attendance. It is, of course, a crime to ignore a court order or summons under Federal<sup>2</sup> and Tribal<sup>3</sup> law.

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<sup>2</sup> See 28 U.S.C. Sec. 1864(b).

<sup>3</sup> Section 2-1-123 of the Colville Tribal Code provides in part: "Any person who shall willfully disobey any lawful order, subpoena, or

"...[A] federal subpoena is as fully and independently operative within the reservation as without...." United States v. Juvenile Male 1, 431 F. Supp. 2d 1012, 1014 (D. Ariz. 2006). The Federal Court clearly can enforce, or re-issue State Court process on reservations. Admittedly, federal courts are limited by FRCP 69(a) from enforcement of state court process in other states. Federal civil process cannot enforce state court process via the federal courts in another state; merely because process is entitled to full faith and credit does not create federal jurisdiction over the matter. However, in light of the traditions of federal court involvement in Indian lands, the same restrictions do not apply to federal court enforcing state court civil process on Indian reservations. See e.g. Annis v. Dewey County Bank, 335 F. Supp 133 (D.S.D. 1971).

As to the Colville Tribal Courts, their cooperation with State Court process is largely discretionary under Section 1-1-102 of their code.<sup>4</sup> The Okanogan County Superior Court Judge could order the Okanogan County Clerk to send all on-reservation summonses to the Colville Tribal Court for

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warrant of the Tribal Court or any officer thereof, shall be guilty of Disobedience of a Lawful Court Order." The code is online at <http://codeamend.colvilletribes.com/current.htm>.

<sup>4</sup> 1-1-102 of the Colville Tribal Code provides: "All judges and personnel of the Tribal Court shall cooperate with all branches of the BIA, with all federal, state, county and municipal agencies, when such cooperation is consistent with this Code, but shall ever bear in mind that their primary responsibility is to the people of the Tribes."





Michael Clark's case, the police should have availed themselves of the procedures under the Colville Tribal Code to properly search the residence in question. If the Tribe provides a legal channel to seek the State's goal, then courts are slow to allow a State process that would disrupt this tribal process.

As stated in State v. Mathews:

Other courts addressing this issue in similar contexts have focused their analysis on the existence of a tribal procedure addressing the execution of state process pursuant to state court jurisdiction over the underlying crime. In State ex rel. Merrill v. Turtle, 413 F.2d 683 (9 Cir. 1969), cert. denied, 396 U.S. 1003, 24 L. Ed. 2d 494, 90 S. Ct. 551 (1970), the court reviewed the validity of a state's extradition of an Indian defendant from the reservation. The court in Merrill recognized that the validity of the state's exercise of jurisdiction within Indian country "must be determined in light of whether such exercise would 'infringe on the right of reservation Indians to make their own laws and be ruled by them.'" 413 F.2d at 685 (citing Williams v. Lee, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959)). The Ninth Circuit, applying this analysis, held that the state's exercise of jurisdiction infringed on the Indians' right to self-government where the tribe had an established extradition procedure which was not followed by the state. However, in State ex rel. Old Elk v. District Court of Big Horn, 170 Mont. 208, 552 P.2d 1394, 1398 (Mont. 1976), the court held that the execution of a state arrest warrant for an Indian within Indian country was valid in the absence of tribal court procedure governing extradition. Thus, the courts addressing the exercise of state arrest jurisdiction within Indian country have found that a determination of whether such an exercise of state authority infringes on tribal sovereignty turns on the existence of a governing tribal procedure.

State v. Mathews, 133 Idaho 300, 314 (Idaho 1999). The Colville Tribal

Code provides as follows:

**2-1-35 Search Warrants**

Every judge of the Court shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of the Court. However, no warrant of search and seizure shall be issued except upon a presentation of a written or oral complaint based upon probable cause, supported by oath or affirmation and charging the commission of an offense against the Tribes. No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and seized and bears the signature of a judge of competent jurisdiction. Service of warrants of search and seizure shall be made by an officer.

**1-1-102 Judicial Cooperation** All judges and personnel of the Tribal Court shall cooperate with all branches of the BIA, with all federal, state, county and municipal agencies, when such cooperation is consistent with this Code, but shall ever bear in mind that their primary responsibility is to the people of the Tribes.

Thus it is clear that the police could have sought a Tribal warrant, but did not.

The Court of Appeals relied on the case of Nevada v. Hicks in making its decision. That case is distinguishable. In Nevada v. Hicks, the Supreme Court phrased the issue in that case as: “[W]hether a *tribal court may assert jurisdiction over civil claims against state officials* who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.” *Hicks*, 533 U.S. at 355, 121 S.Ct. at 2308, 150 L.Ed.2d at 405 (emphasis added). In the case at bar, the issue is whether or not off-reservation police officers can lawfully search trust lands without applying for a search warrant through the Tribal

court. The distinction is that in *Hicks*, the Tribe was attempting to extend its jurisdiction over state officials by subjecting them to civil claims in tribal court. In the case at bar, the State is attempting to extend state-court jurisdiction into the boundaries of the Reservation without the consent of the Tribes.

**D. Conclusion.**

In conclusion, we would ask that the court accept this case for review.

DATED this 12<sup>th</sup> day of May, 2012.

By \_\_\_\_\_  
Stephen Graham, WSBA #25403  
Attorney for Petitioner Michael Clark

I, Stephen Graham, swear under penalty of perjury under the laws of the State of Washington that I served a copy of Appellant's Petition for Discretionary Review by postage paid, first class, U.S. Mail, on the following persons:

|                      |                                  |
|----------------------|----------------------------------|
| Stephen Bozarth      | Michael Clark, #793311           |
| Jennifer Richardson  | Airway Heights Correction Center |
| Prosecuting Attorney | 1313 N 13 <sup>th</sup> Ave      |
| PO Box 1130          | Walla Walla, WA 99362            |
| Okanogan, WA 98840   |                                  |

DATED this 11<sup>th</sup> day of May, 2012

\_\_\_\_\_  
STEPHEN T. GRAHAM



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Reservation, but sits on fee land owned by the railroad.

Detective Jeffery Koplin of the Omak Police Department received a tip that Michael Clark had been involved in the burglary. Mr. Clark is an enrolled member of the Colville Confederated Tribes. The detective went to Mr. Clark's home, which is located in the city of Omak on trust land within the Colville Reservation. Detective Koplin eventually arrested Mr. Clark outside of his house.

The detective applied for and obtained a search warrant for Mr. Clark's residence from the Honorable Chris Culp of the Okanogan County District Court.<sup>1</sup> The detective did not seek a search warrant from tribal court, nor did he seek assistance from the tribal police before serving the warrant. Items stolen in the burglary were recovered from the residence.

Charges of second degree burglary, third degree malicious mischief, and first degree theft were filed in the Okanogan County Superior Court. Defense counsel moved to suppress the evidence recovered from the residence, arguing that the warrant should have been obtained from the tribal court and served by tribal officers. The trial court

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<sup>1</sup> Judge Culp, now a superior court judge for Okanogan County, also served as both a superior court commissioner and as a constitutional pro tempore judge for the superior court at the time. *See* Superior Court Administrative Rule 6. The record does not demonstrate which court he was serving when the warrant issued. For purposes of this opinion, we are assuming he acted within his capacity as a district court judge, although the analysis would not change if he had been serving in superior court.

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heard testimony at the CrR 3.6 hearing and found that the workshop was on fee land belonging to the railroad. Based on that factual determination, the court concluded that state courts had criminal jurisdiction over the burglary scene and thus had authority to issue the warrant for the house on the reservation. The court denied the motion to suppress.

Defense counsel also moved to dismiss the charges or, alternatively, to reconfigure the jury venire. The defense argued that the summons<sup>2</sup> for jury service sent to tribal members living on trust land was ineffectual and, hence, non-compulsory, thus resulting in a non-representative venire. The court heard argument and ruled that there was no systematic exclusion of jurors. The court entered several now unchallenged findings of fact, including: (1) Native Americans make up 1.1 percent of the Okanogan County population; (2) Native Americans routinely serve on Okanogan juries; (3) there was no mechanism for having tribal courts serve state court jury summonses; (4) there was no statistical information on response or jury service rates of Native Americans in the county; (5) many enrolled members of the Colville Confederated Tribes live off-reservation in the county, and many non-enrolled Native Americans live on the reservation; (6) there was no record of anyone being prosecuted in Okanogan County or

<sup>2</sup> While the record is unclear, it appears that the clerk's office sends the same summons to all potential jurors living in Okanogan County regardless of whether they live on reservation trust land or not.

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in tribal court for failure to respond to a jury summons.

The case ultimately proceeded to jury trial. After excusing venire members for hardship reasons, the remaining prospective jurors were asked if any of them were enrolled members of the Colville Confederated Tribes. One juror indicated that she was not an enrolled member, but was the descendant of enrolled members. The record does not reflect whether she served on the jury, nor does it reflect whether any other unenrolled tribal members were present. The jury acquitted Mr. Clark of the burglary and malicious mischief charges, but did convict him of first degree theft. The trial court imposed a standard range sentence. Mr. Clark then timely appealed to this court.

#### ANALYSIS

This appeal reprises the two noted challenges to the search warrant and the jury summons procedure. We conclude that the state courts had authority to issue the search warrant and that Mr. Clark has not proven his challenge to the jury process. Each claim will be discussed in turn.

*Search Warrant Authority.* Mr. Clark argues that the state courts, although they had jurisdiction over the criminal offense, lacked authority to issue the search warrant for his home on reservation trust land. The authority he cites is not persuasive in light of subsequent United States Supreme Court authority.

Public Law 280 authorized the states to assert jurisdiction over reservations within

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their boundaries. *McCrea v. Dentson*, 76 Wn. App. 395, 398, 885 P.2d 856 (1994). Washington's response to Public Law 280 is found in chapter 37.12 RCW. This State asserted civil and criminal jurisdiction over reservation lands, but it declined jurisdiction over Indians while on tribal or trust land.<sup>3</sup> RCW 37.12.010. Because the workshop was on fee land rather than tribal or trust land, the State courts had jurisdiction over the crimes committed there. *Id.*; *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 475, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

However, the search warrant here was served at a location where the State did not have criminal jurisdiction—the residence of an Indian located on trust land. Mr. Clark argues that in that circumstance, the State must resort to tribal courts for search warrants. He relies upon two cases, *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), and *State v. Mathews*, 133 Idaho 300, 314, 986 P.2d 323 (1999).

In *Baker*, the 10th Circuit of the United States Court of Appeals held that a Colorado state court had no jurisdiction to issue a search warrant to seize evidence of suspected methamphetamine manufacturing by a tribal member on property rented by the defendant tribal member within the boundaries of tribal land.

Mr. Clark also relies on language in *Mathews*, where the court stated: “Thus, the

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<sup>3</sup> There are eight specific areas excluded from this declination, but none of them are relevant here. RCW 37.12.010.

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courts addressing the exercise of state arrest jurisdiction within Indian country have found that a determination of whether such an exercise of state authority infringes on tribal sovereignty turns on the existence of a governing tribal procedure.” 133 Idaho 314. In *Mathews*, the crime occurred outside of the reservation. The court determined that tribal sovereignty was not infringed when a state court arrest warrant is executed within Indian country where the state possesses jurisdiction over the underlying crime and where tribal law did not have a procedure in place regulating the execution of state search warrants in cases involving Indians who had committed crimes outside the reservation. *Id.*

This case is neither *Baker* nor *Mathews*. Unlike Colorado in the *Baker* case, Washington had jurisdiction over the crime it was prosecuting. *Mathews* is a little closer factually, but even if the quoted observation is treated as a rule of law, it has been superseded by *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

In *Hicks*, the court faced the question of whether a tribe could assert jurisdiction over state officers serving a state warrant on reservation trust land. The court answered the question in the negative, noting that states typically have jurisdiction over reservation lands unless a competing policy interest prohibited it.<sup>4</sup> 533 U.S. at 361-65. The court specifically ruled that state officers could enter the reservation and serve a search warrant

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<sup>4</sup> The Washington Supreme Court subsequently applied this aspect of *Hicks* to a criminal sentencing condition in *State v. Cayenne*, 165 Wn.2d 10, 14-15, 195 P.3d 521 (2008).



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been consistently upheld as the best source for compiling a fair cross-section of the community. *Id.* at 440-41. However, even if the source list is not unconstitutionally discriminatory, a selection procedure is still invalid if it systematically excludes a cognizable class of individuals. *Id.* at 441.

Where the selection process is in substantial compliance with the statutes, the defendant must show prejudice from the selection process; however, prejudice will be presumed if there is a material departure from the statutes. *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991). This court reviews a trial court's ruling regarding challenges to the venire process for abuse of discretion. *Id.* Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Mr. Clark relies upon the decision in *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 92 Wn.2d 236, 595 P.2d 939 (1979), in support of his contention that the jury summonses are ineffectual against tribal members living on trust land. There the court ruled that superior court could not issue writs of garnishment to tribal businesses and political entities to compel them to withhold from employee paychecks. The tribe was immune from state court attachment. *Id.* at 240-41.

*North Sea* is not persuasive in this context. First, we note that tribes enjoy an immunity that individual members of the tribe do not have. *Puyallup Tribe, Inc. v. Dep't*

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*of Game*, 433 U.S. 165, 171-72, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977). Thus, an action against a tribal member cannot be equated to an action against the tribe itself. Second, we question how closely related a jury summons and a writ of garnishment are for purpose of this analogy. In light of *Hicks*, which extensively discussed the question of service of state process on reservation lands, it is doubtful that *Puyallup Tribe* is applicable here. *See Hicks*, 533 U.S. at 363-64. Nonetheless, we need not decide these questions.

It was Mr. Clark's burden to establish that there was a material departure from the jury selection statutes. Here, it appears that the county used the same process for summoning reservation residents as it used for all other county residents. There was no material departure. In light of that, it became Mr. Clark's burden to establish that there was a systematic exclusion of a distinctive group<sup>5</sup> from the venire. *Hilliard*, 89 Wn.2d at 440. He has not done so.

The record does not reflect that enrolled tribal members systematically failed to appear for jury service in Okanogan County. There was no showing of their participation rates in relation to their proportion of the eligible juror population. All that was established were that there were no enrolled tribal members in the venire of Mr. Clark's

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<sup>5</sup> It is questionable that enrolled tribal members living on trust lands constitutes a distinctive group for this purpose. *See United States v. Smith*, 463 F. Supp. 680, 682 (E.D. Wis. 1979).

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case, even though there was at least one Native American member of the venire. A systematic failure, in the absence of evidence that normal selection procedures were not followed, would require evidence that a cognizable group routinely was excluded from jury service. There is no such evidence in this record.

Far from showing systematic exclusion, the record reflects that enrolled tribal members residing on trust lands were routinely called to jury service, and in the experience of the veteran trial judge, they regularly served on juries. The Okanogan practices were inclusive, not exclusive.<sup>6</sup>

Mr. Clark has not established that any error occurred in the selection of the venire called to his case, nor has he established that the county's process systematically excluded any distinctive groups.

Affirmed.

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Korsmo, C.J.

WE CONCUR:

<sup>6</sup> Mr. Clark's suggested practice of asking federal or tribal courts to summons reservation residents also fails his own test for compulsory service. As both *Hicks* and *North Sea* demonstrate, state courts have no authority to compel tribal or federal courts to do their bidding. Asking those courts to voluntarily undertake the task would be no more compulsory than the current system.

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Sweeney, J.

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Brown, J.